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SUPREME COURT, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

NASRULLA KHAN ---- *PRO SE* PETITIONER,

vs.

PAULA WHITE, & UNITED STATES OF AMERICA ---
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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57 pp

QUESTIONS PRESENTED

1. Did the Court of Appeals err in declining to consider the properly raised violations of petitioner's rights under the Freedom of Speech Clause of the First Amendment, and err in evaluating and denying the violations of his rights under the Due Process Clause of the Fifth Amendment?

2. Did the Court of Appeals err in evaluating and denying petitioner's Federal Tort Claims Act claims under Block v. Neal, 460 U.S. 289 (1983), FTCA statutes, and state laws?

LIST OF PARTIES

John Doe Inspector General of the U.S. Department of Labor, and other federal John Does are parties.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

Order and Judgment of the U.S. Court of Appeals (see App. at a-d; unpublished).

U.S. Court of Appeals' Order denying Petition for Panel Rehearing (see App. at u; unpublished).

U.S. District Court's Order (see App. at e-q).

Magistrate Judge's Scheduling Order (see App. at r-s).

U.S. District Court's "Judgment in a Civil Case" (see App. at t). All orders are unpublished.

STATEMENT OF THE BASIS FOR JURISDICTION

The Order and Judgment of the U.S. Court of Appeals was filed on May 30, 2002. A timely petition for rehearing was denied by the U.S. Court of Appeals on August 1, 2002. Petitioner timely filed a copy of the petition for writ of certiorari on October 29, 2002, but it did not comply with this Court's rules; the Court Clerk's letter of November 12, 2002 gave Petitioner until January 11, 2003 to file the corrected petition. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

First Amendment (See App. at v)
Fifth Amendment (see App. at v)
28 U.S.C. Section 1254(1) (see App. at v)
28 U.S.C. Section 1331 (see App. at v)
28 U.S.C. Section 1346(b)(1) (see App. at v)

28 U.S.C. Section 1402(b) (see App. at v)
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28 U.S.C. Section 2680(h) (see App. at w)
District of Columbia Code Section 22-722 (see App. at w)
District of Columbia Code Section 22-723 (see App. at w)
Utah Code Section 76-8-306 (see App. at x)

STATEMENT OF THE CASE

The U.S. District Court had jurisdiction of this case pursuant to 28 U.S.C. Sections 1331, 1346(b)(1), and 1402(b) for the Bivens claims (Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971)) of Constitutional violations and for the Federal Tort Claims Act ("FTCA") claims.

Khan alerted Utah Occupational Safety and Health Division ("UOSHD") about toxic hazards and violations of OSHA regulations, policies, or laws by Thiokol Corporation ("Thiokol"). UOSHD wrote false statements, misrepresentations, or excuses in its responses to him. Khan wrote to federal OSHA's Regional Office in Denver of his complaint about UOSHD; that Office's response was that UOSHD "properly analyzed and processed" his complaint in accordance with UOSHD procedures and policies.

Khan was not an employee of OSHA or UOSHD. In December 1997, he filed a complaint against UOSHD with Ms. Paula White ("White"), the Director of Federal-State Operations in OSHA. He inquired whether OSHA and UOSHD condone an employer willfully writing false reports about a highly toxic product, whether UOSHD should refuse to respond to pertinent inquiries about safety and hazards, and whether Sprayway 40 Glass Cleaner ("Cleaner") was highly toxic to health. He requested White for answers to these relevant inquiries, but in her response of April 3, 1998, she did not give the answers. On April 20, 1998, Khan wrote to White again requesting answers to his inquiries, but White

did not respond. Khan telephoned White's Office to inquire about her response to his letter of April 20, 1998. A lady named Carol told Khan that she had given his letter to Ms. Carla Slaughter. Slaughter later called Khan who informed her that his complaints were about UOSHD, and that he did not get the answers to his relevant inquiries. She said that she would send him the response within a week or two, but Khan did not get that response.

In June 1998, Khan wrote to the Secretary of Labor and to John Doe Inspector General of the Department of Labor about getting no response from White to his letter of April 20, 1998; he enclosed a copy of that April 20th letter. After White received the Secretary's communication about Khan's complaint, White wrote to Khan on August 4, 1998: "we were unable to locate your April 20, 1998 letter." Again, White did not give answers to Khan's relevant inquiries. She also wrote: "Both Federal OSHA and UOSHD take seriously our statutory mandate to improve safety and health, and are determined to carry out this mission in a fair manner that respects the rights of employers and employees" (Exhibit 5, emphasis added).

On August 25, 1998, Khan wrote to White of his conversations with Carol and Slaughter, and that those conversations indicated that her Office had received his April 20th letter. He enclosed another copy of his April 20th letter, and again requested her response to his complaint and his inquiries. Again, White did not respond.

In September 1998, Khan wrote to the new Secretary of Labor concerning the failure of White to respond to Khan's complaint and relevant inquiries. After White received the Secretary's communication about Khan's complaint, White wrote to Khan on October 1, 1998 the false statements that Thiokol had written in its reports about the Cleaner. White again did not give answers to his inquiries. She introduced into his complaint a different and non-relevant cleaner (Graphic Arts Glass cleaner) that happened to be slightly hazardous to health, and then wrote: "we are unclear as to the reason for the discrepancy between the [hazards reports for

the two cleaners]." (Exhibit 8 at 1-2 and its attachment).

On October 27, 1998, Khan again wrote to the Secretary of Labor regarding White's response. He wrote that: the Graphic Arts Glass cleaner was not the cleaner being used at Thiokol, and his complaint was not about it; and his complaints to UOSHD, OSHA, and White pertained to the Sprayway 40 Glass Cleaner, which was highly toxic to health. He presented facts to show that Thiokol's reports on his hazard alert about the Sprayway 40 Cleaner were false, and Thiokol had deliberately sent those false reports to State and federal agencies.

Khan also wrote that: White refused to confirm that the Sprayway 40 Cleaner was highly toxic to health and was used at Thiokol; she continued to evade answering his relevant inquiries about that highly-toxic Cleaner; Thiokol exposed its employees to that Cleaner without adequate protections; she sent him the MSDS (manufacturer's hazards report) for a different and non-relevant cleaner; the hazards reports for the two cleaners were different because they pertained to two different cleaners, and that only one of those two cleaners was highly toxic to health; she used the false statements that Thiokol had written in its reports. White made false statements when she wrote that Thiokol had discontinued the use of the Cleaner in Khan's work area during his employment there, and that she is unclear as to the reason for the two hazards reports being different. She failed to give answers to his inquiries. Khan wrote that, based on all of the facts, he concluded that UOSHD and OSHA "do not take seriously their statutory mandate to improve safety and health in the workplace, and to respond to complaints fairly and thoroughly." After White received the Secretary's communication about Khan's complaint, White again did not give Khan the answers to his relevant inquiries in her November 1998 response. Khan then ceased corresponding with White.

Khan timely filed his complaint in the U.S. district court but did not serve it. He amended it, and then timely filed

and served his First Amended *pro se* Complaint ("Complaint") pursuant to Fed. R. Civ. P. 4(m); he also filed and served exhibits with that Complaint (Doc. 2, and Exhibits 1-10); those exhibits consisted of his correspondences with White and the Secretaries of Labor. Khan alleged the Bivens claims of violations of his Constitutional rights against White in her individual capacity, and he alleged the FTCA claims against the United States. Under Bivens, a person may sue a federal agent for money damages when the federal agent has allegedly violated that person's constitutional rights (Bivens, 403 U.S. 388). He alleged facts and documents in support of his claims.

White acted under color of federal law, and Khan sued her in her individual capacity for the Bivens claims. Khan alleged that White: committed conscience-shocking acts against him, and acted with deliberate indifference to his rights; and retaliated against him. He alleged that White deliberately: (1) covered up the material facts or evidence; (2) made false statements; (3) did not correct or retract those false statements; (4) retaliated against him; (5) conspired against him; (6) tried to deceive Khan; (7) acted intentionally and outrageously; (8) acted arbitrarily and without just cause; and other acts. He alleged the fraud issue with particularity. He alleged that White's conduct resulted in violations of his Constitutional rights.

Concerning his FTCA claim against the U.S., Khan alleged that White committed wrongful acts and omissions while acting within the scope of her office or employment. He alleged that White: (1) failed to carry out OSHA's statutory mandate, policies, or regulations; (2) retaliated against him; (3) conspired against him; (4) abused her office; (5) obstructed justice concerning his complaint; (6) intentionally inflicted emotional distress on him; and other acts. He alleged that White's conduct resulted in retaliation, conspiracy to retaliate, intentional infliction of emotional distress, and denial of his complaint.

The Magistrate's Scheduling Order set deadlines for

joining additional parties, amending pleadings, discovery, dispositive motions, and then trial, in this sequence (App. at r-s). Immediately after that Order, the Defendants filed a motion to dismiss, stating that: (1) Khan's Complaint failed to state a claim for relief under Bivens; (2) White was entitled to qualified immunity; (3) FTCA did not apply because claim was based on fraud, misrepresentation, discretionary functions of White, and failure to state adequate claims for relief under Utah state laws. Khan filed his opposing memorandum stating that: (1) White's own arbitrary acts against him resulted in violations of his substantive due process rights of the Fifth Amendment; (2) White was not entitled to qualified immunity from the Bivens liability; (3) Khan's FTCA claim against the U.S. was not barred by the discretionary-function exception, the due-care clause, and the misrepresentation exception; his Complaint stated claims under State laws for retaliation, conspiracy, abuse of office, intentional infliction of emotional distress, and obstruction of justice; (4) Khan's Complaint stated claims for which relief can be granted. He also defended against the motion to dismiss on the ground that he had not yet taken his discovery.

Khan served upon defendants a discovery request for production of documents. Defendants did not comply with it; instead, they filed a motion for protective order staying discovery until a decision was rendered on their motion to dismiss which raised the defense of qualified immunity. Khan filed his opposing memorandum arguing that discovery was necessary: to determine White's responsibilities or duties; to determine OSHA's policies, regulations, and other statutory mandates; to determine the evidence and the names of proper parties who conspired with White to deprive him of his rights; to adequately oppose the motion to dismiss and the qualified immunity issue; and for other reasons.

The district court dismissed Khan's Complaint for failure to state a claim against White with prejudice and against the United States; it found the defendants' motion for protective order to be moot. It ignored significant and material

allegations, like: White's failure to comply with OSHA's statutory mandate, regulations, and State laws; Khan had served a discovery request upon the defendants; cover-ups of evidence by White; fabrication of evidence by her; her false statements; her conspiracy with other officials; and Khan's FTCA claim not being barred by 28 U.S.C. Section 2680(a). In its order, the court omitted a very important, material fact or evidence: White's own statement about her determination to carry out OSHA's statutory mandate to improve safety and health. The district court did not give a decision on Khan's actionable retaliation claim. It admitted that White only responded to Khan after the Secretary of Labor (apparently) intervened. Its dismissal of his FTCA claims was based on: misrepresentation and deceit exception of Section 2680(h); failure to state a claim for abuse of process, intentional infliction of emotional distress, and conspiracy under Utah laws; and White was not an investigative or law enforcement officer within the meaning of Section 2680(h). It did not give a ruling on Khan's FTCA claims based on the due-care clause of Section 2680(a). It did not reject his FTCA claims based on cover-ups and obstruction of justice under state laws. The district court did not enter a discovery order. (App. at j-p).

Khan appealed the dismissal to the Tenth Circuit court, arguing that: he sued White in her individual capacity for the Bivens claim; White retaliated against him; she conspired with other officials to violate his rights; he had served a discovery request upon the defendants which he needed to conduct; White's alleged confusion of the two MSDSs was an excuse; he stated his Bivens claim against White for violations of his substantive due process rights based on her numerous, above-mentioned arbitrary actions; White did not comply with the statutory mandate, regulations, and laws; Khan's FTCA claims were not barred by the discretionary-function exception, the due-care clause, and the misrepresentation exception; and he stated his FTCA claims based on state laws.

The Tenth Circuit court affirmed the judgment of dismissal for the reasons stated in the district court's order. In its ruling,

the Tenth Circuit court omitted a very important, material fact or evidence: White's own statement about her determination to carry out OSHA's statutory mandate to improve safety and health. It stated that Khan did not allege facts sufficient to support the claims of retaliation and violation of his First Amendment rights. It omitted significant and relevant material facts, like: White's non-compliance with OSHA's statutory mandate, regulations, and State laws; Khan had served a discovery request upon the defendants; cover-ups of evidence by White; fabrication of evidence by her; White's falsification of official reports; her conspiracy with other officials; and Khan's FTCA claim not being barred by 28 U.S.C. Section 2680(a). The Tenth Circuit court did not enter a discovery order. (App. at b-c).

The Tenth Circuit court denied Khan's timely petition for panel rehearing (App. at u).

REASONS FOR GRANTING THE WRIT

Did the Court of Appeals err in declining to consider the properly raised violations of petitioner's rights under the Freedom of Speech Clause of the First Amendment, and err in evaluating and denying the violations of his rights under the Due Process Clause of the Fifth Amendment?

The Tenth Circuit erred in dismissing his Bivens claims by contravening the binding precedents of this Court, and by creating a conflict with the decisions of the other circuits.

Khan's Arguments in Support of this Petition

(1) The Tenth Circuit Court Erred In Declining To Consider Khan's Retaliation and Free Speech Rights Violations Claims Under *Bivens*

In the district court, in his Complaint, Khan alleged retaliation against him by White. Khan's correspondences

and alleged facts show that he wrote to the Secretaries of Labor ("Secretaries") and to the John Doe Inspector General about White's actions against him. White and the district court admitted that the Secretaries communicated with White about Khan's complaints to them about her (see App. at m); hence, White allegedly had knowledge of his complaints about her. Khan's factual allegations show that White committed unlawful acts against him after she came to know of his complaints about her.

Khan alleges that, after White came to know of his complaints about her, White: (1) refused to confirm that the Sprayway 40 Cleaner was highly toxic; (2) covered up the evidence of Thiokol's writing of false reports about that Cleaner, and of its knowing exposure of its employees to that Cleaner; (3) made false statements about his complaint, about that highly-toxic Cleaner, and about the exposure of the employees to that Cleaner; (4) introduced or fabricated a non-toxic Graphic Arts cleaner, which was not relevant to Khan's complaint, with intent to juggle the hazards reports for the two cleaners, and thereby deceive the Secretaries and Khan; (5) did not carry out the dictates of OSHA's statutory mandate; (6) refused to correct her false statements; (7) conspired with others against Khan; and (8) denied or rejected his complaint. Khan alleges that these actions of White for 11 months were illegal, improper, and/or prohibited by OSHA policies, regulations, or procedures. He alleges that these actions of White were arbitrary or oppressive, which resulted in injuries to him of violations of his substantive due process right under the Fifth Amendment (see infra).

Khan alleges that: (a) his complaints about White to the Secretaries and to the Inspector General involved the matter of public concern of "safety and health of employees"; (b) the First Amendment protected his complaints about White; (c) after White came to know of his protected complaints about her, she deliberately committed the above-mentioned, adverse actions against him; and (d) his protected activities

(his complaints) were the cause of, or substantial cause of, her adverse actions against him, i.e., if he had not complained about White to the Secretaries and the Inspector General, the Secretaries would not have intervened and communicated with White, and White would not have committed the adverse actions against him. These factual allegations satisfy the elements for 'retaliation' (see Holbrook v. Reno, 196 F.3d 255, 263 (D.C. Cir. 1999)).

In Crawford-El v. Britton, 523 U.S. 574, 588 n. 10 (1998), this Court ruled that the reason why a government official's retaliation against a person for speaking out on a matter of public concern offends the Constitution---where the Constitution's First Amendment bars retaliation by a government official for protected speech---is that retaliation "threatens to inhibit exercise of the protected right. Retaliation is thus akin to an unconstitutional condition demanded for the receipt of a government-provided benefit." In Rosenblatt v. Baer, 383 U.S. 75, 85 (1966), this Court ruled: "Criticism of government is at the very center of the constitutionally protected area of free discussion. Criticism of those responsible for government operations must be free;" Wood v. Georgia, 370 U.S. 375, 392 (1962) states the same. Retaliation by White against Khan's exercise of his First Amendment rights is itself a violation of the First Amendment (see Fraternal Order of the Police v. City of Hobart, 864 F.2d 551, 553 (7th Cir. 1988)). The Second Circuit ruled that the First Amendment guarantees the right to petition government for broad redress of grievances (Franco v. Kelly, 854 F.2d 584, 589 (2nd Cir. 1988)). These case laws of this Court and of the other circuits state that a person has a right to complain about an official, and that the official's adverse action would be unconstitutional.

Based on his factual allegations and on the cited rulings of this Court and of the other circuit courts, Khan argues that White's actions were retaliation against him for writing his protected complaints about her, and that her actions resulted in violations of his First Amendment rights (see App. at v).

In the district court, these factual allegations were sufficient to support his claims alleging retaliation and the violations of his First Amendment right to free speech. In Western Center for Journalism v. Cederquist, 235 F.3d 1153, 1158-59 (9th Cir. 2000), the court stated that Bivens remedy is available in First Amendment cases involving retaliation by I.R.S. officials; the I.R.S. officials retaliated against the plaintiffs for exercising First Amendment rights. That case is similar to Khan's case. Therefore, based on the foregoing, Khan stated his claim of retaliation and a Bivens claim directly under the First Amendment.

But the Tenth Circuit court ruled: "Mr. Khan has not alleged facts sufficient to support his new claims alleging . . . First Amendment violations, and retaliation;" it ruled that it declined to consider these claims "raised for the first time on appeal." (App. at c). These rulings are erroneous because, (1) Khan's *pro se* Complaint alleged that White's actions against him were "retaliation" (Doc. 2 at 8, 9, & 10); hence, the district court was aware of Khan's allegations of "retaliation;" (2) in its order, the district court confirmed: "[Khan] complains that White's conduct . . . was in essence a retaliation against him" (see App. at j); and (3) as argued above, Khan alleged facts to satisfy the elements for retaliation (see Holbrook); hence, according to Holbrook, he alleged facts sufficient to support his claims, and the Tenth Circuit's decision conflicts with the D.C. Circuit's Holbrook decision. Hence, the record shows that "retaliation" had been properly raised in the district court. Based on the Ninth Circuit's Cederquist decision, the Bivens remedy is available to Khan in this case. But the Tenth Circuit court declined to consider Khan's actionable retaliation theory that he had properly raised in the district court. Its refusal to consider Khan's valid theories of recoveries under the Constitution is an egregious error requiring remand (see Ryland v. Shapiro, 708 F.2d 967, 973 (5th Cir. 1983)).

Hence, the Tenth Circuit court's decisions have a direct conflict with the binding Crawford-El, Rosenblatt, and

Wood precedents of this Court, have a direct conflict with the Ninth Circuit's Cederquist decision, and have a conflict with the decisions of the Second, Fifth, Seventh, and D.C. circuits concerning retaliation and First Amendment violations. If this Court does not grant this petition, the Tenth Circuit court's decisions would permit other federal officials to retaliate and deprive other people of their First Amendment right of free speech. Therefore, this Court should grant this petition, and correct the Tenth Circuit court's erroneous rulings promptly.

(2) The Tenth Circuit Court Erred In Evaluating and Denying the Violations of Khan's Due Process Rights under *Bivens*

Khan's Complaint and exhibits (evidence) alleged facts about White's numerous, deliberate actions against him, as mentioned above (for the 'retaliation' claim), for 11 months. He alleged also that White: deceived the Secretaries and tried to deceive him concerning the highly-toxic Cleaner; retaliated against him for exercising his right of free speech; and showed reckless disregard for the safety, health, and lives of employees. Khan alleges that these actions of White were illegal, improper, and/or prohibited by OSHA's policies, regulations, or procedures. White acted under color of federal law, and Khan sued her in her individual capacity for his Bivens claims (Doc. 2 at 1, 2, & 6). (Bivens, 403 U.S. at 395-97) (federal officials can be held individually liable for constitutional violations).

In Daniels v. Williams, 474 U.S. 327, 331 (1986), this Court ruled that the substantive due process guarantee protects a person against government power arbitrarily and oppressively exercised. Due process is measured "by that whole community sense of 'decency and fairness' that has been woven by common experience into the fabric of acceptable conduct. It is on this bedrock that this Court has established the concept of due process" (see Breithaupt v.

Abram, 352 U.S. 432, 435 (1957)). In Rochin v. California, 342 U.S. 165, 172 (1952), this Court ruled that substantive due process prevents the government from engaging in conduct that shocks the conscience.

Khan argues that White was a Director in OSHA, and she deliberately went looking for some non-toxic cleaner instead of addressing his complaint about the highly toxic Sprayway 40 Cleaner. White fabricated evidence about a non-relevant Graphic Arts cleaner which was not toxic, and she did not retract that fabrication; Khan argues that her fabrication shocks the conscience (see Morris v. Dearborne, 181 F.3d 657, 668 (5th Cir. 1999) (a teacher's fabrication of sexual abuse against a student's father shocks the contemporary conscience)). He argues that, for 11 months, White's deliberate actions were arbitrary "abuse[s] of power," because those repeated actions of hers violated the statutory mandate, OSHA regulations, and laws (see County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998)). He argued that White's actions against him were "abuse of power" with no "reasonable justification in the service of a legitimate governmental objective," and that "due process protects" him against such abuse (see id.). He argues that, for 11 months, White's use of her power to cover up evidence, make false statements, retaliate, conspire, attempt to deceive, and intend to injure Khan were oppressive abuses of government power, and that the "substantive due process guarantee protects" him against such arbitrary actions of hers (see Daniels, above; see Lewis, at 849 (conduct intended to injure in some way unjustified by any government interest is conscience shocking)). He argues that it is "egregious" for White, a senior federal official, to continue to deliberately refuse to comply with a statutory mandate and with laws (see Lewis, at 847 n.8).

Khan argues that, as his correspondences show, White was aware of her own actions and of the substantial risk of harm her actions were causing him, but yet she continued with such actions. He argues that during those 11 months,

White had ample time to truly deliberate upon her unlawful actions against him and upon her false statements, but yet she continued with her unlawful actions against him and she did not correct or retract her false statements and her fabricated evidence; and that she did not even care if she was violating statutory mandate, regulations, and laws, and harming Khan. (See id., at 851 & 853 (deliberate indifference standard employed only when actual deliberation is practical; indifference is truly shocking when official has opportunities to do better but fails even to care); Brown v. Nationsbank Corp., 188 F.3d 579, 592 (5th Cir. 1999), cert. den. 530 U.S. 1274 (2000) (federal officials made decisions which harmed plaintiffs after ample opportunity for cool reflection)). Hence, White was deliberately indifferent to Khan's rights. The due process clause protects Khan from any harm that arose from White's deliberate indifference (see Brown, at 592). Khan argues that White's outrageous actions were not decent and fair (see Breithaupt, 352 U.S. at 435, above).

Based on the Daniels, Breithaupt, Rochin, and Lewis precedents of this Court and on the decisions of the Fifth Circuit, and looking at the totality of all of White's alleged actions against him, Khan argues that White's actions do shock the conscience, and that those actions resulted in the deprivations of his substantive due process rights under the Fifth Amendment for 11 months (see Rochin, 342 U.S. at 172, above). In Davis v. Passman, 442 U.S. 228 (1979), this Court held that a federal right of action for damages arises directly under the U.S. Constitution when the Fifth Amendment due process clause is violated. Also, White's alleged retaliatory actions against Khan resulted in violation of his First Amendment right of free speech during those 11 months, as argued above. Therefore, based on the factual allegations and on the decisions of this Court and of the Fifth Circuit, White's actions resulted in deprivations of Khan's First and Fifth Amendment rights.

But the Tenth Circuit court affirmed the district court's

ruling that Khan failed to allege facts indicating the deprivation of "a constitutional right" and failed to state a claim (App. at m). These rulings are erroneous because, as argued above, (1) Khan alleged facts sufficient to indicate the deprivations of his First and Fifth Amendment rights, and (2) he stated claims for the deprivations of these two constitutional rights. Also, Khan argues that the lower courts omitted or disbelieved Khan's significant, material factual allegations, like, White's: failure to comply with statutory mandate and laws; fabrication of evidence; cover-up of evidence; retaliation; conspiracy; failure to correct her false statements; and deception. In Neitzke v. Williams, 490 U.S. 319, 327 (1989), this Court ruled that Rule 12(b)(6) does not countenance dismissals based on a judge's disbelief of the complaint's factual allegations. In Davis v. Monroe County Bd. Of Ed., 526 U.S. 629, 633 (1999), this Court ruled that the courts "must assume the truth of the material facts as alleged in the complaint". Khan argues that his factual allegations were sufficient to withstand the pre-discovery dispositive motion.

Hence, the Tenth Circuit court's decisions have a direct conflict with this Court's Rochin, Daniels, Breithaupt, Lewis, Passman, Neitzke, and Monroe County precedents, and have a direct conflict with the decisions of the Fifth Circuit's Brown and Morris cases, concerning violations of the Fifth Amendment's substantive due process rights. If this Court does not grant this petition, the Tenth Circuit court's decisions would permit other federal officials to commit conscience-shocking conduct and deprive other people of their due process rights. Therefore, this Court should grant this petition promptly.

Khan argues that the Tenth Circuit court and the district court omitted, and refused to accept as true his material facts about White's many, deliberate, illegal actions (mentioned above) as alleged in his *pro se* Complaint and exhibits; he argues that those factual allegations supported his claims of retaliation, conspiracy, and the violations of his substantive

due process rights. His factual allegations, if proven, would entitle him to relief (see Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514 (2002)). The lower courts' dismissal of Khan's Complaint on the basis of failure to allege facts has a direct conflict with this Court's binding Neitzke and Monroe County precedents regarding believing and accepting as true the factual allegations. The lower courts refused to apply this Court's binding precedents. Therefore, this Court should grant this petition promptly.

(3) The Tenth Circuit Court Erred In Failing to Consider Khan's *Bivens* Conspiracy Claim

In the district court, Khan alleged conspiracy by White and John Does against him. His Complaint and exhibits show that he wrote complaints about White's unlawful, overt acts against him to the Secretaries and to the John Doe Inspector General (Doc. 2, Exhs. 4, 7 & 9); White and the district court admitted that the Secretaries communicated with White about Khan's complaints about her (App. at m). He alleges that White committed unlawful, overt, retaliatory acts against him after each time she came to know of his complaint about her. Hence, Khan alleges that the Secretaries and the Inspector General were aware of White's unlawful, overt, retaliatory acts, and that they had the authority to stop those acts of her, but they allegedly did not exercise their authority. He alleges or reasonably infers that they instead acquiesced with White in her ongoing pattern of retaliation and of arbitrary oppression against him that resulted in, or subjected him to, ongoing violations of his constitutional rights, and that hence, they treated Khan with deliberate indifference to the deprivations of his rights.

Khan alleges that, after the Secretaries communicated with White about his complaints against her, White retaliated against Khan by deliberately and arbitrarily taking actions against him. His Complaint and exhibits alleged facts about those actions of White against him, mentioned

above (for the 'retaliation' claim), for 11 months. Khan alleges that White, under color of federal law, committed these unlawful, overt, retaliatory acts against him in furtherance of the agreement or conspiracy to retaliate against him and to arbitrarily oppress him for exercising his right of free speech of writing his protected complaints about her to the Secretaries and to the Inspector General. He alleges that White's unlawful, overt, retaliatory acts and arbitrary oppressive acts against him resulted in violations of his First Amendment right to free speech and violations of his substantive due process rights of the Fifth Amendment.

In Re Quarles And Butler, 158 U.S. 532, 538 (1895), this Court ruled that a conspiracy to oppress and injure a person for exercising his rights is punishable. In Pinkerton v. U.S., 328 U.S. 640, 646-648 (1946), this Court ruled that, under the doctrine of co-conspirator liability, conspirators are responsible for the reasonably foreseeable acts of fellow conspirators in furtherance of the conspiracy. In Harris v. Roderick, 126 F.3d 1189, 1196 (9th Cir. 1997), federal officials were properly sued for conspiracy to deprive a person of his constitutional rights. In Ting v. U.S., 927 F.2d 1504, 1512 (9th Cir. 1991), the court stated: "To have an actionable Bivens conspiracy claim, [plaintiff] must establish (1) the existence of an express or implied agreement among the defendant officers to deprive him of his constitutional rights, and (2) an actual deprivation of those rights resulting from that agreement;" Scherer v. Balkema, 840 F.2d 437, 442 (7th Cir. 1988), cert. den. 486 U.S. 1043, states the same. "Conspiracy does not give a right of action unless it leads to wrongful acts or omissions" (Olivares v. NASA, 934 F.Supp. 698, 705 (D.Md. 1996), affirmed 114 F.3d 1176).

It is well established that an agreement sufficient to support a conspiracy claim can be inferred from circumstantial evidence (see U.S. v. Gatling, 96 F.3d 1511, 1518 (D.C. Cir. 1996)). A conspiracy need not be shown by proof of an explicit agreement, but can be established by showing that the parties have a tacit understanding to carry

out the prohibited conduct (Thomas v. Roach, 165 F.3d 137, 146 (2nd Cir. 1999)).

Khan argues that the Secretaries and the Inspector General are co-conspirators because they could reasonably foresee the unlawful, overt, retaliatory acts and oppressive conduct of White in furtherance of the conspiracy; also Khan had written to them and they took no actions to stop White's misconduct; hence, they are liable as co-conspirators (see Pinkerton, 328 U.S. at 646-648).

Based on the above factual allegations and circumstances, and on the decisions Quarles and Pinkerton of this Court and of the other circuits, he argues or reasonably infers the existence of a conspiracy or an implied agreement or understanding among White, the Secretaries, the John Doe Inspector General, and other John Does to retaliate against him and to arbitrarily oppress him for filing protected complaints (see Glasser v. U.S., 315 U.S. 60, 80 (1942) (a common purpose and plan may be inferred from a development and a collocation of circumstances, and a jury could make the inference about the existence of the conspiracy)).

Khan argues that his protected complaints were the cause of, or substantial factor for, White's adverse, unlawful, overt retaliation against him. Retaliation is actionable under District of Columbia laws also (see Holbrook, 196 F.3d at 263). He stated his retaliation claim and his Bivens due process claims directly under the First and Fifth Amendments above in this petition, and he is entitled to relief and damages for the injuries, as he alleged in his Complaint.

Based on the Quarles, Pinkerton, and Glasser precedents of this Court and on the decisions of the Second, Fourth, Seventh, Ninth, and D.C. circuits, and on his factual allegations, Khan stated a claim of Bivens conspiracy against White and the coconspirators for which relief can be granted. But the Tenth Circuit court ignored this actionable, constitutional claim, even though he had presented his

allegations and this conspiracy claim in the district court. The Tenth Circuit court offered no reason for failing to give a decision on this actionable constitutional Bivens claim. Its refusal to consider Khan's valid theory of recovery under the Constitution is an egregious error requiring remand (see Ryland, 708 F.2d at 973). The Tenth Circuit court's failure contravenes the above cited, binding precedents of this Court, and has created a direct conflict with the decisions of the Second, Fourth, Seventh, Ninth, and D.C. circuits concerning Bivens conspiracy. Therefore, this Court should grant this petition to prevent conspiracy by other federal officials against other people.

Additional material facts about the conspiracy, the names of the John Doe defendants, who allegedly are proper parties, and their actions in furtherance of the conspiracy, are to be determined through discovery. He asserts that during discovery, facts will emerge to support his claims against the John Does and the Secretaries. "The courts have recognized that the nature of conspiracies often makes it impossible to provide details at the pleading stage and that the pleader should be allowed to resort to the discovery process and not be subjected to a dismissal of his complaint" (Federal Practice & Procedure, Wright & Miller, Vol. 5, Section 1233, at 257 (2d ed. 1990)). Khan argues that dismissal was improper, and this Court should grant this petition.

Khan alleges that his factual allegations were sufficient to withstand the pre-discovery dispositive motion. The Tenth Circuit court's failure to give a decision on proper and actionable constitutional claims is in direct conflict with the binding Quarles, Pinkerton, and Glasser precedents of this Court. Therefore, this Court should grant this certiorari for review promptly to resolve a direct conflict also between the Tenth Circuit and the Second, Fourth, Seventh, Ninth, and D.C. circuits on this constitutional issue. If not corrected, the Tenth Circuit court's failure will result in conspiracy by other federal officials against other people.

Did the Court of Appeals err in evaluating and denying petitioner's Federal Tort Claims Act claims under Block v. Neal, 460 U.S. 289 (1983), FTCA statutes, and state laws?

The Tenth Circuit erred in dismissing Khan's FTCA claims by contravening the binding precedents of this Court, and by creating a conflict with the decisions of the other circuits.

Khan's Arguments in Support of this Petition

The Tenth Circuit erred in applying 28 U.S.C. Section 1346(b)

Khan alleged that Ms. White caused him injuries by committing negligent or wrongful acts and omissions against him, while acting within the scope of her office or employment. He filed this FTCA claims against the United States for money damages (see 28 U.S.C. Section 1346(b)(1), App. at v).

Khan alleged that his FTCA claims against the United States were based on the following wrongful or negligent acts or omissions of Ms. White: (1) refusal to carry out the dictates of OSHA's statutory mandate to improve safety and health; (2) retaliation against him; (3) conspiracy with others to retaliate against him; (4) failure to use due care; (5) violations of state laws; (6) intentional infliction of emotional distress on him; and (7) obstruction of justice. Khan alleged facts in his *pro se* Complaint and exhibits about these acts or omissions of White, and he drew reasonable inferences in his favor about Whites' conduct from those alleged facts. He suffered injuries of retaliation against him, conspiracy to retaliate against him, victimization due to her illegal acts against him, intentional infliction of emotional distress, and denial of his complaint. He alleges that White's acts and omissions violated OSHA's regulations, procedures, or policies, and violated the local laws of the District of Columbia or Utah, and injured him.

In Hatahley v. U.S., 351 U.S. 173, 181 (1956), this Court ruled: "Due care implies at least some minimal concern for the rights of others."

Khan argues that Congress did not intend to shield from tort liability the above-mentioned illegal acts or omissions that White allegedly committed (see Annotation, 6 L.Ed.2d 1421, 1425). He argues that White's acts and omissions were wrongful or negligent that resulted in injuries to him. Khan argues also that because White failed to perform her statutory duties and thus caused injuries to him, the United States is liable under FTCA (see Indian Towing Co. v. U.S., 350 U.S. 61, 69 (1955) (the U.S. is liable for damage caused by failure to perform a duty).

White committed the acts and omissions in Washington, D.C., that caused injuries to Khan in Utah; hence, the United States' liability is determined by the application of the law of the District of Columbia where the acts or omissions occurred, pursuant to 28 U.S.C. Section 1346(b)(1) (see App. at v). "In determining which state's substantive law to apply to a tort case, the District of Columbia's choice of law rules require this Court to use the 'governmental interests' analysis approach" (Raflo v. U.S., 157 F.Supp.2d 1, 5 (D.D.C. 2001)). The District's interest is "in holding its corporations liable for the full extent of the negligence attributable to them" (Id. at 7). Hence, Khan argues that substantive tort laws of the District of Columbia apply in this case.

Khan argues that the local laws of the District of Columbia prohibit a private employer or its employees from: (1) refusing to comply with a statutory mandate; (2) retaliating against a person; (3) conspiring to retaliate against him; (4) intentionally inflicting emotional distress on him; and (5) obstructing justice. (See App. w).

Khan argues that White owed him a duty to use due care in complying with statutory mandates and state laws so as to not injure him by: violating state laws; intentionally inflicting emotional distress on him; retaliating and conspiring against him; victimizing him; and obstructing

justice. He argues that White breached that duty by violating the laws against him; that her breach of that duty proximately resulted in the injuries of intentional infliction of emotional distress, denial of his complaint, retaliation against him, conspiracy to retaliate against him, and victimization due to her illegal acts against him. Under Utah law, to recover for negligence, Khan must show that (1) White owed him a duty, (2) she breached the duty, (3) the breach of duty was a proximate cause of Khan's injuries, and (4) there was in fact injuries (see Jackson v. Righter, 891 P.2d 1387, 1392 (Utah 1995)). Under District of Columbia law, the same elements must be alleged to prevail on a negligence claim (see Patel v. Howard University, 896 F.Supp. 199, 205 (D.D.C. 1995)). Under District of Columbia law and Utah law, violation of a statute or regulation that is designed to protect people is negligence *per se*, and the element of negligence is established as a matter of law (see Weston v. Washington Metro. Area Transit, 78 F.3d 682, 687 (D.C. Cir. 1996); Child v. Gonda, 972 P.2d 425, 432 (Utah 1998)). Hence, based on the above factual allegations and case laws, Khan argues that White's conduct was negligent, and that the United States is liable for White's failure to comply with statutory mandate, regulations, and laws that prohibit these acts against him.

Under the District of Columbia law, the elements of a conspiracy are (1) an agreement between two or more persons (2) to participate in an unlawful act, or in a lawful act in an unlawful manner, and (3) an injury caused by an unlawful overt act performed by one of the parties to the agreement (4) pursuant to, and in furtherance of, the common scheme (see U.S. v. Philip Morris, 116 F.Supp.2d 116, 122 (D.D.C. 2000)). For a claim of retaliation, a plaintiff must show that (1) he engaged in a protected activity, (2) the defendant took an adverse action against him, and (3) a causal connection between the two exists (see Holbrook, 196 F.3d at 263).

If Utah's local laws were to apply, then those laws prohibit the above-mentioned actions. Under Utah law, to prove civil

conspiracy, five elements must be shown: (1) a combination of two or more persons, (2) an object to be accomplished, (3) a meeting of the minds on the object or course of action, (4) one or more unlawful, overt acts, and (5) damages as a proximate result thereof (see Peterson v. Delta Air Lines, Inc., 42 P.3d 1253, 1257 (Utah App. 2002)). (See App. x).

But the Tenth Circuit court affirmed the district court's ruling that Khan "failed to state facts that allege a tort upon which the United States could be held liable" (App. at n; App. at c). This ruling is erroneous because the state laws themselves classify White's acts or omissions as torts, as stated above. The Tenth Circuit did not give any reasons why White's non-compliance with OSHA's statutory mandate and state laws is not a tort of negligence *per se*. It did not deny Khan's FTCA claims that were based on retaliation and obstruction of justice; hence, Khan did state his FTCA claims against the United States for the torts of retaliation and obstruction of justice under state laws.

Also, Khan alleged facts sufficient to state FTCA claims for conspiracy (as stated above in this petition) and negligence *per se* based on state laws, and for intentional infliction of emotional distress also. Therefore, the United States, if a private employer or person, would be liable to Khan in accordance with the local laws of District of Columbia (or Utah) for money damages for injuries caused by these wrongful or negligent alleged acts and omissions of White while acting within the scope of her office or employment (28 U.S.C. Sections 1346(b)(1) and 2674, see App. at v & w).

Based on the Indian Towing and Hatahley precedents of this Court and on the decision of the D.C. Circuit, and looking at the totality of all of White's alleged actions against him, Khan argues that White's acts and omissions were torts based on the laws of the District of Columbia (or Utah). The Tenth Circuit court's decision has a direct conflict with the above-cited precedents of this Court, and has a direct conflict with the decisions of the D.C. circuits, and federal and state statutes. Therefore, this Court should grant this petition to

prevent other federal officials from committing torts against other people.

The Tenth Circuit erred in applying 28 U.S.C. Section 2680(h)'s misrepresentation exceptions

In Block v. Neal, 460 U.S. 289 (1983), this Court held that a claim not arising out of misrepresentation within the meaning of 28 U.S.C. Section 2680(h) (see App. at w), is not barred by that provision. In U.S. v. Neustadt, 366 U.S. 696, 711 n.26 (1961), this Court ruled that misrepresentation exception is generally applicable to actions for damages due to commercial decisions made in reliance on government misrepresentations.

In Crumpton v. Stone, 59 F.3d 1400, 1403 (D.C. Cir. 1995), cert. denied 516 U.S. 1147 (1996), the court ruled that if a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow, "then the due care clause applies and the government is exempt from suit as long as the employee has exercised due care in following the dictates of the statute or regulation." When the government violates a duty of care independent of its obligation to avoid conveying false information, it may incur liability under the FTCA (see Sowell v. United States, 835 F.2d 1133, 1135 (5th Cir. 1988).

Khan argues that because OSHA's statutory mandate and regulations specifically prescribed courses of action for White to follow, the due-care clause of 28 U.S.C. Section 2680(a) (see App. at w) required her to exercise due care in carrying out the dictates of the statutory mandate and regulations (see Crumpton, 59 F.3d at 1403, above). He argued that White did not exercise due care because she allegedly did not carry out the dictates of OSHA's statutory mandate to improve safety and health, and the dictates of OSHA's regulations. Also, Khan alleged that White violated State laws by retaliating and conspiring against him (as argued above in this petition), and by inflicting emotional

distress and obstructing justice, and that she acted with disregard for Khan's right to be free from injuries caused by her illegal and wrongful acts or omissions (see Hatahley, 351 U.S. at 181, above; see Section 1346(b), App. at v). Hence, he argues that White did not exercise due care by committing these illegal acts. Based on these factual allegations and on the decisions in Hatahley and Indian Towing of this Court, and the Crumpton and Sowell decisions in the other circuit courts, Khan's FTCA claims against the United States are not barred by Section 2680(a)'s due-care clause.

The gravamen of Khan's FTCA claims involves White's failure to execute OSHA's statutory mandate, her commission of illegal acts against him, and her failure to exercise due care in executing the statutes and regulations. He had also alleged that White made false statements.

But the Tenth Circuit court affirmed the district court's ruling that the "most obvious tort would be misrepresentation" (App. at n). Khan argues that this decision is erroneous because the Tenth Circuit court ~~incorrectly~~ focused only on misrepresentations, instead of on White's failure to carry out the dictates of OSHA's statutory mandate and regulations, on her failure to exercise due care, and on her violations of the State laws, with her false statements being independent of, or collateral to, these acts and omissions of hers. He argues that, in its ruling, the Tenth Circuit court ignored the very important allegations or evidence: White's own statement as to her determination to carry out OSHA's statutory mandate to improve safety and health, and Khan's allegations that White did not carry out that mandate and that she violated the State laws. He argues that the Tenth Circuit court did not accept or believe his factual allegations as true, and did not see the whole picture about White's real conduct; it did not look at the substance of Khan's *pro se* Complaint in determining whether the Complaint states a claim coming within any of the exceptions provided in Section 2680 (see Annotation, 6 L.Ed.2d at 1426).

Khan argues that the misrepresentation or deceit exception of 28 U.S.C. Section 2680(h) (see App. at w) does not bar his FTCA claims that are based on these acts and omissions (excluding the false statements) of White, because White's false statements were independent of, or collateral to, these other acts and omissions of hers (see Block, 460 U.S. 289, above). Khan argues that his FTCA claims were based on White's above-mentioned acts and omissions, and that White's false statements were not essential to those FTCA claims (see Block, 460 U.S. at 297 ("the Government's misstatements are not essential to plaintiff's negligence claims"); Sowell, 835 F.2d at 1135, above). He argues that White's acts and omissions (excluding her false statements) caused him the injuries, as stated above.

Khan argues that White's duties to execute the dictates of OSHA's regulations and of the statutory mandate to improve safety and health, to exercise due care in executing statutes and regulations, and to not violate State laws are independent and "distinct from any duty to use due care in communicating information" to Khan (see Block, 460 U.S. at 297). "Section 2680(h) does not . . . grant an exception to a tortious failure of . . . the United States to perform a duty imposed upon it by law" (see Hicks v. U.S., 511 F.2d 407, 414 (D.C. Cir. 1975)).

Khan argues that even if one aspect of White's conduct (i.e., her false statements) was not actionable under the misrepresentation exception, the FTCA does not bar him from pursuing other distinct, actionable claims arising out of other aspects of White's acts or omissions; this Court so ruled in Block, 460 U.S. at 298. Any other interpretation of the FTCA would encourage the Government to shield itself completely from tort liability by adding misrepresentations to whatever otherwise actionable torts it commits. Hence, the misrepresentation exception, within the meaning of Section 2680(h), does not apply here (Block, 460 U.S. 289).

Khan stated facts that allege torts, as argued above, and White's false statements were independent of, or collateral

to, her wrongful or negligent acts and omissions. Based on the above arguments and on the Block, Neustadt, Indian Towing, Sowell, and Hicks case laws, the United States is liable for injuries to Khan caused by White's wrongful or negligent acts and omissions (except her false statements). The misrepresentation and/or deceit exceptions do not bar Khan's FTCA claims.

The Tenth Circuit court's decision contravenes directly and fails to apply this Court's Block, Neustadt, Indian Towing, Neitzke, and Monroe County precedents, and conflicts directly with the decisions of the Fifth and D.C. circuits. Therefore, this Court should grant this petition promptly to prevent other officials from committing torts, and violating statutory mandates, regulations, and laws.

Intentional Infliction of Emotional Distress: Khan has a claim also about intentional infliction of emotional distress against the defendants. He intends to argue this claim if this petition is granted.

CONCLUSION

In view of the conflict of many decisions below with binding precedents of this Court, this Court may wish to consider summary reversal; alternatively, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Nasrulla Khan January 13, 2003

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 01-4192 (D.C. No. 1:00-CV-61-S) (D. Utah)

NASRULLA KHAN, Plaintiff – Appellant,

v.

PAULA WHITE; UNITED STATES OF AMERICA, for Federal Tort Claims Act Claim only, Defendants – Appellees.

ORDER AND JUDGMENT*
Filed: May 30, 2002

Before SEYMOUR, PORFILIO, and BALDOCK, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Plaintiff Nasrulla Khan, proceeding pro se, appeals the district court's order dismissing his lawsuit for failure to state a claim upon which relief can be granted, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. We exercise jurisdiction under 28 U.S.C. Section 1291 and affirm.

Mr. Khan sued defendant White in her capacity as the Director of Federal-State Operations for the Occupational Health and Safety Administration (OSHA). He claimed Ms. White violated his constitutional rights and the agency's statutory mandates by her handling of his questions and claims about a highly toxic cleaner used at his employment several years earlier. At his request, the Utah Occupational Safety and Health Division (UOSH) investigated his charges that the cleaner was toxic and was applied inappropriately.

Dissatisfied with the UOSH's response, Mr. Khan turned to OSHA, where he corresponded with Ms. White. In the course of the correspondence, Ms. White informed Mr. Khan that no further action would be taken with regard to his charges. In her letter of October 1, 1998, Ms. White referred to a different, less toxic cleaner than the cleaner named in Mr. Khan's inquiry.

Mr. Khan's complaint alleged that Ms. White's acts and omissions violated his Fifth Amendment rights, subjecting her to liability under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). His claims against the United States were brought under the Federal Tort Claims Act (FCA), 28 U.S.C. Sections 1346(b), 2671-2680, and were based on Ms. White's acts and omissions in her correspondence about the toxic cleaner. The district court held that Mr. Khan's complaint failed to state a claim upon which relief can be granted.

On appeal, Mr. Khan challenges the order dismissing his complaint, reasserting his arguments and authorities. In addition, he maintains that the district court failed to consider or evaluate all of Ms. White's actions. He also claims that discovery would have permitted him to learn facts to substantiate some of his claims. Mr. Khan has added the following claims on appeal that were not presented to the district court: he was denied his right of access to the courts, his First Amendment rights were violated, and Ms. White retaliated against him. Finally, he asserts that the district court erred by not allowing him to amend his complaint.

The district court's order to dismiss under Rule 12(b)(6) is reviewed de novo. Stidham v. Peace Officer Standards & Training, 265 F.3d 1144, 1149 (10th Cir. 2001). The complaint's allegations of fact are accepted as true and the complaint is examined to determine if it, standing alone, "is legally sufficient to state a claim for relief." Wyoming v. United States, 279 F.3d 1214, 1222 (10th Cir. 2002). Conclusory allegations are not facts. See Maher v. Durango

Metals, Inc., 144 F.3d 1302, 1304 (10th Cir. 1998). Because plaintiff is representing himself on appeal, his pleadings will be liberally construed. Haines v. Kerner, 404 U.S. 519, 520 (1972).

Mr. Khan did not request leave to amend his complaint. Instead, he included in his opposition to dismissal a request for an opportunity to amend "[i]f pro se Plaintiff's Complaint fails to state the claim." R. doc. 35, at 15. He did not suggest how an amendment would cure the deficiencies of his complaint. It is "patently obvious" that Mr. Khan cannot prevail on these facts and that permitting him to amend his complaint would be futile. McKinney v. Okla. Dep't of Human Servs., 925 F.2d 363, 365 (10th Cir. 1991). Therefore, the district court did not err in dismissing the case without allowing Mr. Khan to amend his complaint. See id.

We decline to consider the issues raised for the first time on appeal. Walker v. Mather (In re Walker), 959 F.2d 894, 896 (10th Cir. 1992). We note, however, that Mr. Khan has not alleged facts sufficient to support his new claims alleging denial of access to the courts, First Amendment violations, and retaliation. See Diaz v. Paul J. Kennedy Law Firm, No. 01-2103, 2002 WL 982581, *2 (10th Cir. May 14, 2002) ("While plaintiffs' pro se pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers, plaintiffs must nonetheless set forth sufficient facts to support their claims.").

We have carefully reviewed the record on appeal, as well as the briefs submitted by the parties. Applying the standards set out above, we affirm the judgment of dismissal for substantially the reasons stated in the district court's well-reasoned memorandum and order entered August 21, 2001.

AFFIRMED. The mandate shall issue forthwith.

Entered for the Court, s/John C. Porfilio, Circuit Judge

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

United States District Court, District of Utah
June 4, 2002
In the matter of: Khan v. White
U.S. District Court Case Number; 1:00cv61 S
USCA Court Case Number: 01-4192

On 06/03/02, pursuant to the Order of the U.S. Court of Appeals for the Tenth Circuit, the Mandate in the above-cited case was filed and docketed.
Sincerely, s/by Markus B. Zimmer, Clerk

APPENDIX B

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH – NORTHERN DIVISION

CASE NO. 1:00CV0061 ST

NASRULLA KHAN, Plaintiff,

vs.

Paula White, et al., Defendants.

Memorandum and Order Denying Defendants' Motion to Strike; Granting Defendants' Motion to Dismiss; Denying Defendants' Motion for Protective Order

Filed: 21 August 2001

Before the Court are the following motions: (1) Defendants' motion to dismiss Plaintiff's complaint with prejudice, (Docket Doc. #23), (2) Defendants' motion to strike Plaintiff's supplemental memorandum, (Docket Doc. #40), (3) Defendants' motion for a protective order, (Docket Doc. #43). The Court has reviewed the memoranda submitted by the parties and, pursuant to DUCivR 7-1(f), will decide the motion without oral argument. Having reviewed the relevant law and considered the arguments set forth by the parties, and being fully advised, the Court hereby enters the following memorandum and order:

I BACKGROUND

Plaintiff's first amended complaint alleges a Bivens cause of action against Defendant Paula White ("White"), and a Federal Tort Claims Act against the United States. The facts underlying the instant complaint stem from Plaintiff's prior employment with Thiokol Corporation. While employed at Thiokol, Plaintiff allegedly complained to Thiokol about

their use of Sprayway 40 Glass Cleaner without appropriate safety precautions. (Amended Complaint at Exh. 1.) When Thiokol allegedly did not take precautions against further use of Sprayway 40 Glass Cleaner, Plaintiff complained to the Utah Occupational Safety and Health Division (UOSHD). Plaintiff became unsatisfied with the way that UOSHD handled his complaint, and on December 29, 1997, he wrote a letter to the Occupational Safety and Health Administration ("OSHA"). Among other things, this letter contained asked three questions:

> Thiokol's written statement (this Cleaner is not toxic and is not hazardous) to government agencies and to me is obviously false and deceiving. Thiokol has not denied this. Therefore, Thiokol knowingly wrote that false and deceiving statement. Do OSHA and UOSHD accept or tolerate such willful writing of false and deceptive statements by an employer concerning highly toxic hazards?
>
> UOSHD did not give me a response to my repeated inquiries of whether or not this Cleaner is highly toxic to health. Should not UOSHD give me an answer to a pertinent safety and hazards related inquiry?
>
> UOSHD wrote that they went through their complaint process and determined that my complaint against Thiokol was not a valid one. Based upon all the facts, is not my complaint a valid one?

(Amended Complaint at Exh. 1.) This letter made its way to White, OSHA's Federal-State Operations Director. (Amended Complaint at p.3, Exh. 1.)

White responded on April 3, 1998, informing Plaintiff that the Denver Regional Office had investigated Plaintiff's complaint about state program administration ("CASPA") and determined that UOSHD had "properly analyzed and processed [Plaintiff's] complaint in accordance with approved UOSHD complaint procedures and policies."

(Amended Complaint at Exh. 2.) White also informed Plaintiff that the Regional Administrator was the "designated authority for making final determinations on CASPA's" and that because Plaintiff's exposure to the Sprayway 40 Glass Cleaner occurred in 1990, further investigation "would not be meaningful." (Id.) White told Plaintiff that the Agency could do nothing more in regards to his complaint. (Id.) Plaintiff alleges that this response "did not give answers to Plaintiff's relevant and specific inquiries." (Amended Complaint at p.3.)

Plaintiff responded to White's April 1998 letter by writing another letter on April 20, 1998, this time directly to White, requesting that White answer his inquiries. (Amended Complaint at Exh. 3.) (1) Plaintiff alleges he never received a response from White to this letter. (Amended Complaint at p.5.)

On May 13, 1998, Plaintiff called White's office and spoke to a woman named Carol. Carol allegedly informed Plaintiff that Plaintiff's April 1998 letter had been given to a woman named Slaughter. Plaintiff later received a phone call from Slaughter who told Plaintiff that she would send a response to Plaintiff's April 1998 letter within two weeks. Plaintiff alleges that he never received this response. (Amended Complaint at pp. 3-4.)

On June 3, 1998, Plaintiff wrote to the Office of the Inspector General of the Department of Labor about White's failure to respond. (Amended Complaint at p.4) (2) On June 17, 1998, Plaintiff wrote another letter to the Secretary of Labor concerning White's failure to respond. (Amended Complaint at p.4, Exh. 4.) On August 4, 1998, White wrote a letter to Plaintiff claiming that her office never received Plaintiff's April 1998 letter, and reaffirming that OSHA could do nothing more about his complaint. (Amended Complaint at Exh. 5.) Plaintiff alleges that White again failed to answer the "relevant and specific inquiries" that he had previously made. (Amended Complaint at Exh. 4.)

Plaintiff wrote another letter to White dated August 25, 1998, wherein he informed White of his conversation with Carol and Slaughter, which in Plaintiff's mind indicated that White's office "has, or did have, [Plaintiff's] April 20, 1998, letter." (Amended Complaint at Exh. 6.) Plaintiff also included a copy of his April 1998 letter and again requested that White answer his inquiries. (Id.) Plaintiff alleges that he did not receive a response to this letter. (Amended Complaint at p.4.)

Plaintiff called White's office on September 9 and 10 of 1998 and left messages, but claims that his phone calls were never returned. (R. at 2, p.4.) On September 10, 1998, Plaintiff authored another letter to the Secretary of Labor, wherein Plaintiff related the foregoing correspondence and complained of OSHA's lack of responsiveness to his inquiries. (Amended Complaint at Exh. 7.) On October 1, 1998, White wrote a letter to Plaintiff. (Amended Complaint at Exh. 8.) In this letter, White detailed the history of Plaintiff's complaints, UOSHD's conduct, and specifically addressed Plaintiff's inquiry about whether the Glass Cleaner was toxic. (3) (Amended Complaint at Exh. 8.) Plaintiff alleges that White made false statements in the October 1998 letter,(4) did not give answers to his inquiries, and "introduced a different and non-relevant product into Plaintiff's complaint. (Amended Complaint at p.5.)

On October 27, 1998, Plaintiff authored another letter to the Secretary of Labor wherein he complained about White's alleged inadequate response. (Amended Complaint at Exh. 9.) One specific complaint Plaintiff made was that in White's October 1998 letter, the MSDS she used was for a "Graphic Arts Glass Cleaner," not the "Sprayway 40 Glass Cleaner" that Plaintiff complained about. (Amended Complaint at p.1, Exh. 9.) This is Plaintiff's explanation of the "discrepancy" between the two MSDSs alluded to by White. On November 20, 1998, White wrote another letter to Plaintiff expressing her regret that Plaintiff was not satisfied with her earlier responses, but that Plaintiff's complaint had

been thoroughly reviewed and there was nothing further to investigate. (Amended Complaint at Exh. 10.)

Plaintiff filed a complaint on May 31, 2000, and the instant Amended Complaint on September 18, 2000. Plaintiff's first cause of action, a Bivens complaint against White, alleges that she "acted arbitrarily, capriciously, irrationally, and/or without just cause concerning Plaintiff's complaint." Plaintiff contends that White

> abused her power when she: (1) covered up material facts . . . (2) wrote misrepresentations in her official reports . . . (3) wrote and sent false or fraudulent official reports to Plaintiff . . . (4) did not retract or correct her false or fraudulent reports after Plaintiff informed her of the misrepresentations in her reports . . . (5) tried to deceive Plaintiff . . . (6) obstructed justice with respect to Plaintiff's complaint . . . (7) acted arbitrarily, capriciously, irrationally, and without just cause . . . [and] (9) failed to investigate Plaintiff's complaint about UOSHD.

(Amended Complaint at pp. 5-6.) Plaintiff alleges that the above conduct was done with deliberate indifference to, or in disregard of, Plaintiff's Fifth Amendment due process rights. (Amended Complaint at p.6.) Alternatively, Plaintiff argues that the above conduct was done with reckless disregard of, or with conscious indifference to, the "high probability of such conducts causing deprivation" of his Fifth Amendment due process rights.

Plaintiff's second cause of action against the United States is brought under the Federal Tort Claims Act (FTCA), and alleges that White

> (i) . . . wrote and sent false or fraudulent official responses to Plaintiff, or kept silent . . . (ii) . . . did not retract or correct her false or fraudulent official responses after Plaintiff informed her of the misrepresentations in her responses; (iii) . . . covered up material facts or evidence . . . (iv) . . . obstructed justice concerning Plaintiff's complaint; (v) . . . tried to deceive Plaintiff by knowingly writing misrepresentations, and by knowingly using a

non-relevant product as a cover-up . . . (vi) . . . failed to conduct an investigation of Plaintiff's complaint; (vii) . . . abused her governmental power; (viii) . . . acted arbitrarily, capriciously, irrationally, and without just cause . . . .

(Amended Complaint at p.7.) Plaintiff continues to allege that White's conduct amounts to fraud and fraudulent concealment. (Amended Complaint at 8-9.) Plaintiff claims that White's behavior was "extreme, outrageous and shocking," or alternatively was done with "reckless disregard of, or with conscious indifference to, the high probability" that it would deprive Plaintiff of his constitutional rights. (Amended Complaint at p.9.)

With respect to damages, Plaintiff complains that White's conduct caused him to suffer emotional distress, anger, and was in essence a retaliation against him. (Amended Complaint at p.10.) Plaintiff seeks $125,000 in punitive damages and $125,000 in compensatory damages, plus the costs of the suit, and seeks an injunction, although Plaintiff does not specify what he wants enjoined. (Id.)

Defendants filed a motion to dismiss on January 10, 2001. After Plaintiff responded and Defendants replied, Plaintiff filed an addendum of supplemental authority. Defendants filed a motion to strike this addendum. Thereafter, Defendants filed a motion for a protective order.

* * *

II DISCUSSION

* * *

B. Defendants' Motion to Dismiss

Defendants argue that Plaintiff's complaint should be dismissed because (1) it fails to state a claim upon which relief can be granted under either Bivens or the FTCA, (Fed. R. Civ. P. 12(b)(6)), (2) White is entitled to qualified immunity from Bivens liability, (3) Plaintiff's tort allegations of fraud and misrepresentations are barred by the FTCA, (4)

Plaintiff's tort claims are barred by the discretionary-function exception, and (5) Plaintiff's complaint fails to state a claim for relief under applicable Utah state laws.

1. Plaintiff's Bivens claim against White

Defendants argue first that Plaintiff has failed to adequately allege a Bivens claim. Specifically, Defendants argue that Plaintiff has failed to articulate a constitutional right that White violated. In a 12(b)(6) motion, all well-pleaded allegations of the complaint are accepted as true and construed in the light most favorable to the plaintiff. Yousef v. Reno, 254 F.3d 1214, 1219 (10th Cir. 2001). "Well-pleaded allegations" are distinguishable from "conclusory allegations." See Maher v. Durango Metals, Inc., v. 144 F.3d 1302, 1305 (10th Cir. 1998). While reasonable inferences drawable from the well-pleaded facts must be accepted, courts are not required to accept "mere conclusions characterizing pleaded facts" or "unwanted inferences drawn from the facts or footless conclusions of law predicated upon them." Bryson v. City of Edmond, 905 F.2d 1386, 1389 (10th Cir. 1990) (citations omitted). Finally, A complaint should not be dismissed under Rule 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Yousef, 254 F.3d at 1219.

A person whose constitutional rights are violated by a federal employee may, in some circumstances, sustain a civil suit for damages for violation of that constitutional right. See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 391-97 (1971). Analyzing whether a plaintiff has adequately alleged a Bivens claim is a two-step process. First, because Bivens recognizes a claim for damages for deprivations of constitutional rights, the threshold question is whether the plaintiff has alleged facts sufficient to constitute an infringement upon his or her constitutional rights. Assuming the claimant satisfies this

test, it is well recognized that Bivens does not authorize a cause of action for every infringement upon constitutional right. See, e.g., Bush v. Lucas, 462 U.S. 367, 368 (1983) (refusing to allow Bivens action for violations of federal employee's First Amendment rights by his superiors). The Tenth Circuit has stated that deciding whether a Bivens cause of action should lie for a particular infringement should be decided on a case-by-case basis. Beattie v. Boeing Co., 43 F.3d 559, 564 n.12 (10th Cir. 1994). Furthermore, courts should engage in a "special factors" analysis to determine whether the particular case involves "special factors counseling hesitation [in recognizing a cause of action] in the absence of affirmative action by Congress." Id., Chappell v. Wallace, 462 U.S. 296, 298 (1983) ("Before a Bivens remedy may be fashioned . . . a court must take into account any special factors counseling hesitation.") (quotation omitted). In other words, where Congress has not expressly authorized a cause of action for damages for a particular constitutional violation, it is the court's duty to determine whether there are any "special factors" indicating that the court should not fashion a remedy. Id.

In this case, Plaintiff claims that White's conduct violated his substantive and procedural due process rights under the Fifth Amendment. The Fifth Amendment provides in relevant part: No person shall . . . be deprived of life, liberty, or property, without due process of law . . . . The recitation of facts at the beginning of this memorandum, which were taken from Plaintiff's complaint, reveal that Plaintiff has not alleged facts revealing a constitutional deprivation. First, and most importantly, Plaintiff does not have a Fifth Amendment right, procedurally or substantively, that requires White or OSHA to answer his complaints, letters, telephone calls, or any other correspondence directed towards OSHA. Even if federal regulations or policies required White to answer Plaintiff's letters and respond to his inquiries, White's failure to do so in this case simply does not rise to the level of a constitutional deprivation of rights.

Furthermore, Plaintiff does not, and cannot in good faith, contend that OSHA's failure to respond resulted in harm to Plaintiff's person, a deprivation of property or property rights, or any other deprivation of a fundamental right or freedom. Plaintiff's claim that he suffered severe emotional stress and was angered by White's alleged inadequate responses does not allege the type of injury for which Bivens recognizes a cause of action. Federal jurisprudence bears out that, in many cases, persons have suffered much more egregious deprivations of constitutional rights that have not been recognized as supporting a cause of action under Bivens. See, e.g., Beattie, 43 F.3d at 564 (employment restrictions imposed because of plaintiff's political activities).

Second, contrary to Plaintiff's characterization of the facts, White's responses were not false, misleading, deceptive, arbitrary, capricious, irrational, or tortious in any respect. At most, White (1) failed to timely respond to Plaintiff, and only responded after the Secretary of Labor (apparently) intervened, (2) failed to answer Plaintiff's specific inquiries, and (3) confused the MSDSs of two products. No reasonable construction of White's letters suggests that she was in any way deceitful, fraudulent, or arbitrary. White's conduct certainly does not approach, as Plaintiff claims, the level of "conscience shocking" activity.

Because Plaintiff has failed to allege facts indicating the deprivation of a constitutional right, the court concludes that Plaintiff has failed to state a claim against Defendant White for which relief can be granted. Accordingly, Defendants' motion to dismiss Plaintiff's first cause of action is GRANTED with prejudice.

2. Plaintiff's FTCA claim against the United States

Analysis of an FTCA claim generally begins with 28 U.S.C. Section 1346(b), which provides in relevant part:

> (b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District

> Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Title 28, section 2674 of the U.S. Code further provides:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

The Court concludes that Plaintiff has failed to state facts that allege a tort upon which the United States could be held liable. The most obvious tort would be misrepresentation. However, the United States is immune from liability under the FTCA for claims arising out of misrepresentation:

> The provisions of this chapter and section 1346(b) of this title shall not apply to – * * * (h) Any claim arising out of . . . misrepresentation, deceit . . . .

28 U.S.C. Section 2680(h); see Bergman v. United States, 751 F.2d 314, 317 (10th Cir. 1985) (noting that FTCA claims against the United States for misrepresentation and deceit are barred by immunity retained through 28 U.S.C. Section 2680(h)).

Plaintiff contends that his FTCA claim is not based on allegations of fraud or misrepresentation, but upon the violation of U.S. statutes, the constitution, and abuse of process. With respect to alleged violations of U.S. statutes, Plaintiff has cited none. Furthermore, assuming that White's conduct violated federal regulations, FTCA liability cannot

be predicated on such conduct because the "torts" to which the U.S. has waived its immunity through the FTCA are determined by state law, not by looking to federal law or regulations:

> "Where a claim is wholly grounded on a duty imposed by an allegedly violated federal statute or regulation, to allow FTCA recovery . . . without requiring that there be some specific basis for concluding that similar conduct by private persons or entities would be actionable under state law, is to in essence discriminate against the United States: recovery against it is allowed, although [a] . . . private person or entity would not be subject to liability under state law. Plainly, the FTCA waiver of sovereign immunity does not go so far."

United States v. Agronics Inc., 164 F.3d 1343, 1346 (10th Cir. 1999) (quoting Johnson v. Sawyer, 47 F.3d 716, 729 (5th Cir. 1995)). With respect to the alleged constitutional violations, this argument has previously been discussed and rejected.

* * *

Plaintiff argues that his complaint alleges other torts that fall within the FTCA and are recognized by Utah law, such as intentional infliction of emotional distress, fraudulent writings, and conspiracy. The Court finds that Plaintiff's allegations fail to state a claim for intentional infliction of emotional distress and conspiracy. The Court further concludes that the so-called fraudulent writings tort falls with Section 2680(h) 's "misrepresentation" and "deceit" exception to U.S. liability under the FTCA.

In sum, the Court finds that even construing the allegations favorably to Plaintiff, Plaintiff has failed to state a claim against the United States upon which relief can be granted. Accordingly, Defendants' motion to dismiss Plaintiff's second cause of action is GRANTED.

C. Defendants' Motion for a Protective Order

In light of the Court's rulings set forth previously in this Order, the Court finds Defendants' motion for a protective order moot. The motion is therefore DENIED as moot.

III CONCLUSION

For the foregoing reasons, . . . Defendants' Motion to Dismiss with prejudice is GRANTED, and Defendants' Motion for a Protective Order is DENIED.

SO ORDERED
Dated this 20th day of August, 2001.

By the Court: s/Ted Stewart, United States District Judge.

1 The Court notes that Plaintiff's April 1998 letter mis-characterized his own inquiries that were made in his December 1997 letter. In Plaintiff's April 1998 letter, he told White that one of his inquiries in the December 1997 letter was "Is the Sprayway 40 Glass Cleaner highly toxic to health? (Amended Complaint at Exh. 3.) Plaintiff never made this inquiry in the December 1997 letter. (See Amended Complaint at Exh. 1.)

2 Plaintiff did not attach a copy of this June 3, 1998, letter to his complaint.

3 With respect to the Glass Cleaner's toxicity, White stated the following:

In response to your question as to whether the Sprayway 40 glass cleaner is *"highly toxic"*, enclosed is the Material Safety Data Sheet (MSDS) on the glass cleaner provided to us by Sprayway, Inc. According to this MSDS, the glass cleaner has a product hazard rating of 1 (one) for health which indicates a *"slight"* hazard associated with this product. However, the MSDS you provided to us has a product hazard rating of 3 (three) which indicates a *"highly toxic"* hazard associated with this product. Both MSDSs indicate

the major ingredients in this Glass Cleaner are 70% water; 20% ethyl alcohol; and 2% butoxyethanol.

We are unclear as to the reason for the discrepancy between the two documents, but hope you will be reassured by the fact that the manufacturer of the product has determined it to present only a *"slight"* health hazard. Although, you may have an unusual sensitivity to the product, your employer did remove the glass cleaner from your area during the time you were employed. We are aware of no other similar employee complaints at your former workplace.
(R. at 2, Exh. 8, p.2.)

4 Plaintiff specifically alleges that the following statements by White were false: "Thiokol Corporation had taken the appropriate action by discontinuing use of the product in Plaintiff's work area; UOSHD properly analyzed and processed his complaint according to approved UOSHD complaint procedures and policies." (Amended Complaint at p.5.)

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL/NORTHERN DIVISION

Date: 1/8/01 Time : 11:00 AM Mag: Judge Ronald N. Boyce

Case No. 1:00CV 61 ST

KHAN, Plaintiff(s),
vs.
White, Defendant(s)

SCHEDULING ORDER --- Filed: 8 January, 2001

Pursuant to Fed. R. Civ. P. 16(b), Magistrate Judge Ronald N. Boyce conducted a scheduling conference this date in the matter cited above. The following matters were discussed and scheduled. The times and deadlines set forth herein may not be modified without the approval of the Court and on a showing of good cause:

I. PLEADINGS/MOTIONS:	DATE	TIME
a. Cutoff for Amended Pleadings (Includes Addition of Parties)	Per Report	
b. Cutoff for Dispositive Motions	8/30/01	4:30 pm

II. DISCLOSURE	YES	NO
a. Was Rule 26(f)(1) Conference held?	X	
b. Was 26(a)(1) Initial Disclosure Completed?		X
c. Has Attorney Planning Meeting Form been submitted?	X	

	DATE	TIME
d. Date(s) for Other 26(a)(1) proceedings	Waived	
e. Rule 26(a)(2) Reports from Retained Experts		
Plaintiff(s)	4/30/01	4:30 pm
Defendant(s)	5/31/01	4:30 pm
Counter Reports		

f. Rule 26(a)(3) Pretrial Disclosures
Plaintiff(s)
Defendant(s)

III. DISCOVERY CUTOFF 7/30/01 4:30 pm

IV. DISCOVERY STIPULATIONS & ORDERS

V. PRETRIAL CONFERENCES:

a. Special Attorney Conference
b. Settlement Conference
c. Final Supplementation
d. Final Pretrial Conference 10/12/01 4:30 pm

VI. TRIAL	LENGTH	TIME	DATE
a. Bench Trial			
b. Jury Trial	4 Day	8:30 AM	10/22/01
Jurors:			Eight

VII. ALTERNATIVE DISPUTE RESOLUTION	YES	NO
a. Referral to Court-Annexed Mediation		
b. Referral to Court-Annexed Arbitration		

VIII. LIMITATIONS ON DISCOVERY	NUMBER
a. Maximum Number of Depositions by Plaintiff(s)	10
b. Maximum Number of Depositions by Defendant(s)	10

* * *

d. Maximum Interrogatories by and Party to any Party 50

IX. OTHER MATTERS:

a. Nature of Claim: Bivens/FTCA
b. Settlement Potential: Unknown at this time
c. Other: Trial will FTCA non jury, jury on Bivens claim

Dated this 8 day of January, 2001.
By the Court: s/Ronald N. Boyce, U.S. Magistrate Judge.

APPENDIX D

UNITED STATES DISTRICT COURT - Northern Division of Utah
Case Number: 1:00cv61 ST

NASRULLA KHAN
v.
Paula White et al

JUDGMENT IN A CIVIL CASE

This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered. IT IS ORDERED AND ADJUDGED that judgment be entered in favor of the defendants and plaintiff's cause of action is dismissed.

Entered on docket: 8-23-01, by the Deputy Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 01-4192

NASRULLA KHAN, Plaintiff – Appellant,

v.

PAULA WHITE; UNITED STATES OF AMERICA, for Federal Tort Claims Act Claim only, Defendants – Appellees.

ORDER
Filed: August 1, 2002

Before SEYMOUR, PORFILIO and BALDOCK, Circuit Judges.

Appellant's petition for rehearing is denied.

Entered for the Court Patrick Fisher, Clerk of Court, by s/Deputy Clerk

APPENDIX F

The First Amendment to the U.S. Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fifth Amendment to the U.S. Constitution provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . .."

28 U.S.C. Section 1254 states: "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . .."

28 U.S.C. Section 1331 states: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

28 U.S.C. Section 1346(b)(1) states: "[T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his [or her] office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

28 U.S.C. Section 1402(b) states: "Any civil action on a tort claim against the United States under subsection (b) of section 1346 of this title may be prosecuted only in the

judicial district where the plaintiff resides or wherein the act or omission complained of occurred."

28 U.S.C. Section 2674 states: "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . .."

28 U.S.C. Section 2680 states: "The provisions of this chapter and section 1346(b) of this title shall not apply to -

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, . . . or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal . . . employee of the Government, whether or not the discretion nvolved be abused.

* * *

(h) Any claim arising out of . . . misrepresentation, deceit, ..."

District of Columbia Code Section 22-722: Obstructing Justice: "(a) A person commits the offense of obstruction of justice if that person: . . . (6) Corruptly, . . ., any way obstructs or impedes or endeavors to obstruct or impede the due administration of justice in any official proceeding."

District of Columbia Code Section 22-723: Obstructing Justice: "Tampering with physical evidence; . . .. (a) A person commits the offense of tampering with physical evidence if, knowing or having reason to believe an official proceeding has begun or knowing that an official proceeding is likely to be instituted, that person alters, . . . conceals, or removes a record, document, or other object, with intent to impair its integrity or its availability for use in the official proceeding."

Utah Code Section 76-8-306: "Obstruction of justice – Elements -- . . ..

(1) An actor commits obstruction of justice if the actor, with intent to hinder, delay, or prevent the investigation, apprehension, prosecution, conviction, or punishment of any person regarding conduct that constitutes a criminal offense: . . . (b) prevents by . . . deception, any person from performing any act that might aid in the discovery, apprehension, prosecution, conviction, or punishment of any person; (c) . . . conceals, or removes any item or other thing; (d) makes, presents, or uses any item or thing known by the actor to be false; . . ..

(2)(a) As used in this section, "conduct that constitutes a criminal offense" means conduct that would be punishable as a crime and is separate from a violation of this section, and includes: (i) any violation of a criminal statute or ordinance of this state, its political subdivisions, any other state, or any district, possession, or territory of the United States . . ..